RECORD AND BRIEFS

Nos. 16-1436, 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE FOURTH AND NINTH CIRCUITS

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) suspends for 90 days the entry of foreign nationals from six Muslim-majority countries. Respondents allege, and each lower court that reached the question found, that the Executive Order impermissibly targets Muslims. The question presented is:

Whether the Executive Order's alleged religious targeting should in the first instance be evaluated under the Establishment Clause or the Free Exercise Clause.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Becket has long sought to protect minority groups from religious targeting by the government. Accordingly, Becket has appeared as counsel or amicus in many cases in which the government has singled out a particular religious group or practice for worse treatment than its secular analogues. See, *e.g.*, *Holt*, 135 S. Ct. 853 (counsel for Muslim petitioner seeking to grow a short religious beard where prison system allowed beards for nonreligious reasons); *Singh* v. *Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (counsel for Sikh plaintiffs successfully challenging refusal to let Sikhs serve in the military while observing religious requirement to wear beard and turban); *Merced* v. *Kasson*, 577 F.3d 578 (5th Cir. 2009) (counsel for Santería priest challenging municipal ban on religious animal sacrifice that allowed killings for secular reasons); Petition for Writ of Certiorari, *Stormans, Inc.* v. *Wiesman*, No. 15-862 (U.S. Jan. 4, 2016) (counsel for Christian pharmacists challenging state law prohibiting conscientious

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[1] No party's counsel authored any part of this brief. No person other than *Amicus* contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

refusals to provide certain drugs but allowing refusals for business and other secular reasons); *Moussazadeh* v. *Tex. Dep't of Criminal Justice*, 709 F.3d 487 (5th Cir. 2013) (counsel for observant Jewish prisoner seeking kosher diet).

Becket has also long argued that the Establishment Clause should not be used to pit church and state against one another, and has in particular opposed application of the *Lemon* test. See, *e.g.*, *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (challenge to Pledge of Allegiance); *Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) (challenge to exhibition of "Ground Zero Cross" in museum); *New Doe Child #1* v. *United States*, No. 16-4440 (8th Cir. filed Dec. 13, 2016) (challenge to "In God We Trust" on currency).

Based on its expertise in this area, and in keeping with understandings of the Free Exercise and Establishment Clauses it has long advocated in a variety of contexts, Becket files this brief in favor of neither party on the merits. Rather, as a friend of the Court and of the First Amendment, Becket offers something that has been missing in the litigation thus far: a proper understanding of the complementary roles of the Establishment and Free Exercise Clauses and how they should apply in a case of alleged religious targeting.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The stakes in this case could not be much higher. On one side, there are claims that the government has targeted a particular religious group for disfavor, something repugnant to our constitutional traditions.

Singling out a particular religious group for punishment or mistreatment is always constitutionally suspect and, in fact, presumptively unconstitutional. Only in rare circumstances can the government hope to survive strict scrutiny and justify religious targeting.

On the other side, the government offers weighty national security interests and the preservation of American lives, in the context of a slew of terrorist incidents around the world that are claimed to be religiously motivated. These are, by any measure, interests of the highest order.

But the stakes here are higher still because of those Americans who are *not* before the Court. That is because this litigation will set the standard for how to balance these different interests for the many religious liberty cases that will arise in the future. What law this Court applies, how this Court applies that law, and how it balances the various interests at stake are questions that transcend the particular personalities and issues in this case and go instead to the very heart of the constitutional order.

The lower courts and Respondents did not address these questions. Instead, each court below that reached Respondents' constitutional claims used the wrong Religion Clause and the wrong legal test to root out claimed religious targeting. They used the Establishment Clause (which aims to prevent government involvement in religion) rather than the Free Exercise Clause (which protects religious individuals and groups from burdens on their religious beliefs and exercise). But as this Court indicated more than two dec-

ades ago in *Lukumi*, it is typically only efforts to control or "to benefit religion or particular religions" that can establish religion in violation of the Establishment Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). By contrast, laws that "discriminate[] against some or all religious beliefs or * * * conduct" should be analyzed in the first instance under the Free Exercise Clause. *Ibid.*; see also *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' * * * ." (quoting *Lukumi*, 508 U.S. at 542)).

Unfortunately, while other plaintiffs challenging the same Executive Order identified their claims as arising under the Free Exercise Clause, Respondents failed to do so. The litigants and courts then compounded that error of choosing the wrong Clause by applying the wrong test, using *Lemon*'s ahistorical "purpose" analysis rather than the historically grounded *Town of Greece* approach. To date, none of the lower courts in these two cases has been asked to analyze the question of religious targeting under the clause that most naturally prevents it: the Free Exercise Clause. Put differently, it is free exercise doctrine, not Establishment Clause doctrine, that gives courts the tools needed to determine whether the Executive Order is a benign national security measure or an invidious "Muslim ban."

These errors, if left uncorrected, would come at significant cost. The use of the wrong Clause and the wrong test led the courts below to decide important questions of First Amendment rights and national security by relying on inferences about the state of mind

of a single government official. Worse still, because the lower courts used the Establishment Clause, they invalidated the Executive Order without weighing the government's claimed interest in protecting national security and by applying a very broad remedy—striking down the Order altogether.

That is a bad outcome for considering the government's interests, for considering religious interests, and for reducing church-state conflict. The national security interests weren't considered at all. And avoiding a formal balancing test ultimately harms religious liberty interests because it puts too much pressure on courts to balance by other, unstated means. The danger of informal balancing is all the greater here because the *Lemon* test depends so heavily on the state of mind of individual officials who will eventually no longer be in office. By contrast, under the Free Exercise Clause, courts can balance enduring interests through the time-tested affirmative defense of strict scrutiny. Moreover, courts can design remedies that are tailored to the specific plaintiffs before the Court, thus reducing the scope of church-state conflict.

Under a Free Exercise analysis, this Court's unanimous decision in *Lukumi* provides a roadmap for this case. There, the Court analyzed a law that was deliberately crafted to target one particular religious minority while allowing similar conduct for nonreligious purposes. That is the gravamen of the complaint here. Under *Lukumi*, there are many ways in which Respondents might show that the Executive Order is either not neutral or not generally applicable, and therefore merits strict scrutiny review.

But instead of looking to *Lukumi*, the courts and plaintiffs below chose to follow the *Lemon* will-o'-the-wisp, much to the detriment of both the resolution of this litigation and the constitutional order. Because the Order's constitutionality under the First Amendment has not properly been litigated below, the cases should be remanded.

ARGUMENT

I. The courts below incorrectly applied the Establishment Clause.

The courts that reached Respondents' constitutional claim below relied solely on the purpose prong of the *Lemon* test to enter a nationwide injunction against the Executive Order. But *Lemon* is a poor test for determining whether an act of government establishes religion. Under the appropriate historical analysis, the Executive Order does not establish religion.

A. *Lemon* provides a poor foundation for deciding Establishment Clause claims.

To say that *Lemon*'s three-pronged test has a troubled past is putting it mildly. In recent cases, the Court has treated the *Lemon* factors, at best, as "no more than helpful signposts." *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality) (quotation omitted). More often—and without exception in the last decade—it has not applied *Lemon* at all. See *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

The lower courts, however, continue to feel obligated—or empowered—to apply *Lemon* in the absence

of clear doctrinal guidance on the Establishment Clause.

Lower court judges have criticized, and scholars have expressed frustration at, the inconsistent application invited by the subjective factors in *Lemon*. See, *e.g.*, *Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbrook, J., dissenting from *en banc* decision) (calling *Lemon* "hopelessly open-ended"); *Card* v. *City of Everett*, 520 F.3d 1009, 1023-24 (9th Cir. 2008) (Fernandez, J., concurring) ("The still stalking *Lemon* test and the other tests and factors * * * are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable."); Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum. L. Rev. 1373, 1380-88 (1981) (*Lemon* an "important source of confusion"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118-20 (1992) ("the Court has contrived a formula for interpreting the Establishment Clause that contains inconsistencies within a single test").

One of *Lemon*'s many problems, as highlighted by this case, is that it wrongly places the focus on the subjective intent of lawmakers to determine whether an action is an establishment of religion. Whether a lawmaker had a religious or secular intent can be famously difficult to discern, and the focus on this question as the first prong of a disjunctive test leads to an overemphasis on extra-textual evidence of what a lawmaker's actions may mean, despite the Court's admonition to avoid "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005).

Here, application of the *Lemon* test resulted in an issue of national security and constitutional law turning in part on judicial interpretation of tweets and television interviews, Pet. App. 11a, 49a, and an assessment of how long the "taint" of those statements might last. *Id.* at 61a n.21. Absent from the analysis was any serious consideration of the historical elements of an establishment.

B. Both the majority and principal dissent in *Town of Greece* require a history-based approach to Establishment Clause claims.

This Court's most recent Establishment Clause precedent, *Town of Greece*, sets forth a far better mode of analysis—one that supersedes *Lemon* and provides the objective criteria lower courts need for evaluating whether a challenged government practice establishes a religion. *Town of Greece* rejected the idea that the allowance of legislative prayer in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), "carv[es] out an exception" to general Establishment Clause jurisprudence. *Town of Greece*, 134 S. Ct. at 1818. Instead, the Establishment Clause "must" be interpreted "'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989). Importantly, this focus on history was the approach also adopted by the principal dissent in *Town of Greece*. See *id.* at 1845-51 (Kagan, J., dissenting) (citing historical practice).

Town of Greece starts from the premise that an "establishment of religion" had a defined meaning at the time of the founding, and that history is an important guide to interpreting what that means to courts today. Historical analysis has long played an important role

in Establishment Clause doctrine. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *E.E.O.C.*, 565 U.S. 171, 181-87 (2012) (summarizing historical view of Establishment Clause); *Van Orden*, 545 U.S. at 686 (citing history); *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8-16 (1947) (same). But before *Town of Greece*, courts often failed to begin with the all-important question: what is an establishment of religion? See *Town of Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring) (considering "what constituted an establishment" at the time of the founding); see also Eric Rassbach, Town of Greece *v.* Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S. Ct. Rev. 71 (2014). When courts objectively assess whether modern government actions mirror the establishments the Founders rejected, Establishment Clause jurisprudence will be clearer and more predictable.

Six features characterized founding-era establishments. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). Judge Kelly and Chief Judge Tymkovich employed those features in their dissenting opinion in *Felix* v. *City of Bloomfield*, 847 F.3d 1214 (10th Cir. 2017), *petition for cert. filed* (July 6, 2017) (No. 17-60). They are: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Id.* at 1216 (Kelly, J., dissenting) (quoting McConnell, 44 Wm. & Mary L. Rev. at 2131).

These categories should have been applied in this case and would have led to the conclusion that the Executive Order does not constitute an establishment of religion.

C. The Executive Order does not violate the Establishment Clause.

The Executive Order displays none of the six characteristics of a historical establishment.

1. The Executive Order does not create state control over doctrine, governance, and personnel of a church.

At the time of the founding, state control over the institutional church manifested itself in the control of religious doctrine and the appointment and removal of religious officials. McConnell, 44 Wm. & Mary L. Rev. at 2132; see also Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). Thus, colonial establishments typically included government appointment and removal of ministers, rendering religious groups "subservient" to their state masters. McConnell, 44 Wm. & Mary L. Rev. at 2140-41; see also *Hosanna-Tabor*, 565 U.S at 182-83 (describing government control over ministerial appointments during the colonial period). This control over who was appointed a minister was an element of establishment the Founders sought to avoid. *Hosanna-Tabor*, 565 U.S. at 183 (citing 1 Annals of Congress 730-31 (1789)).

The Executive Order does not seek to control religious doctrine. No church is compelled by the Executive Order to adopt or reject religious doctrine, clergy, or governance.

2. The Executive Order does not compel church attendance.

Anglican colonies like Virginia followed England's example by fining those who failed to attend Church of England worship services. McConnell, 44 Wm. & Mary L. Rev. at 2144; George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* 412 (1947). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 513 (Burt Franklin 1970) (1902); Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in * * * religion").

The Executive Order has nothing to do with church attendance, compulsory or otherwise.

3. The Executive Order provides no financial support to any church.

At the time of the founding, public financial support took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. McConnell, 44 Wm. & Mary L. Rev. at 2147. Land grants, the most significant form of public support, provided not only land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148.

The Executive Order does not financially support any church.

4. The Executive Order does not prohibit worship.

As part of their efforts to prop up the state churches, colonies sometimes prohibited worship by adherents of non-state religions. Some colonial establishments were more tolerant than others, and those that were less tolerant singled out particular groups to banish.[2] McConnell, 44 Wm. & Mary L. Rev. at 2131, 2161. Some establishments tolerated "orthodox" dissents from the official state religion, some singled out particularly vexatious individual denominations (like Quakers) for persecution, and some outlawed any form of worship outside the strict doctrine of the state church. Virginia, for example, imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horse-whipped others for the same offense. *Id.* at 2119, 2166. Several states banned Catholic churches altogether. *Id.* at 2166. This element of an establishment took the form of control of religious belief and worship by the established church.

The Executive Order does not encourage or discourage worship of any kind.

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[2] The Church of England is an example of a modern "tolerant" establishment, where the church is given official status as the state religion, but dissenting worship is not prohibited. Saudi Arabia is an example of an "intolerant" establishment.

5. The Executive Order does not cede important public functions to church institutions.

A fifth element of establishment is government assignment of important civil functions to church authorities. At the founding, states used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. McConnell, 44 Wm. & Mary L. Rev. at 2169-76. Thus, at certain points in state history, New York recognized only those teachers who were licensed by a church; Virginia ministers were tasked with keeping vital statistics; and South Carolina recognized only those marriages performed in an Anglican church. *Id.* at 2173, 2175, 2177.

The Executive Order gives no important civil functions to any church. No religious group has the authority to determine immigration policy or entry criteria.

6. The Executive Order does not restrict political participation to members of any church.

The final feature of an establishment is the restriction of political participation based on church affiliation or the lack thereof. At the time of the founding, England allowed only Anglicans to hold public office and vote; many states took comparable measures. McConnell, 44 Wm. & Mary L. Rev. at 2177. Although religious tests were prohibited at the federal level by the Religious Test Clause of Article VI, *id.* at 2178, Maryland's version of religious disqualification lasted until 1961, when the Supreme Court struck it down. See *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

The Executive Order does not impose any religious test for political participation. Respondents present no claim that the Executive Order violates the ban on religious tests for office, limits voting rights, or interferes with other aspects of political participation.

II. Respondents' religious-targeting claim should be evaluated under the Free Exercise Clause instead.

That Respondents' Establishment Clause claim fails does not mean that the religious targeting they allege is without a First Amendment remedy; it means only that they have relied on the wrong Religion Clause. To the extent that *Lemon* sweeps religious-targeting cases into the Establishment Clause, it is inconsistent with this Court's modern Free Exercise jurisprudence.

In these cases, although Respondents have pled religious targeting, they have not properly labeled their claim as a free exercise claim. By contrast, other plaintiffs challenging the Executive Order have invoked the Free Exercise Clause. See Second Am. Class Action Compl. ¶¶ 271-276, *Doe* v. *Trump*, No. 2:17-cv-178 (W.D. Wash. filed May 8, 2017); First Am. Class Action Compl. ¶¶ 9, 110-16, *Al-Mowafak* v. *Trump*, No. 3:17-cv-557 (N.D. Cal. filed Mar. 13, 2017). For the reasons set forth below, the Free Exercise Clause provides the most appropriate avenue for a First Amendment religious targeting claim.

A. Targeting of a particular religious group has historically been viewed as a Free Exercise, not an Establishment Clause, problem.

The core of Respondents' theory is that the Executive Order is unconstitutional because it "singl[es] out" members of one particular religion—Muslims—"for disfavored treatment." First Am. Compl. ¶¶ 5, 63, *Int'l Refugee Assistance Project* v. *Trump*, No. 8:17-cv-361, ECF No. 93 (D. Md. Mar. 10, 2017). That claim sounds in Free Exercise, not Establishment, both historically and today.

To be sure, the historical establishments prohibited by the Establishment Clause sometimes included efforts to suppress minority faiths. Virginia, for instance, banned Quakers from immigrating and prosecuted and imprisoned Baptist preachers. McConnell, 44 Wm. & Mary L. Rev. at 2163, 2165-66. And Massachusetts Bay adopted an Act Against Heresy, which banished from the colony any person who denied the immortality of the soul, resurrection, sin in the regenerate, the need of repentance, redemption or justification through Christ, the morality of the fourth commandment, or infant baptism. *Id.* at 2161.

But these efforts to exclude and suppress dissent were *in addition to* laws affirmatively promoting or controlling the established church; they were a way to buttress the establishment but they did not constitute the establishment itself. McConnell, 44 Wm. & Mary L. Rev. at 2120, 2127-31 (explaining that establishments could be "tolerant or intolerant," with the difference being the extent to which they persecuted dissenters); see also *Torcaso*, 367 U.S. at 490 (discussing

state establishments and the "consequent burdens" they "imposed on the free exercise of * * * nonfavored believers"). In other words, Virginia did not have an established church because it persecuted Baptists and excluded Quakers; it had an established church because it erected Anglican "churches * * * in every parish at public expense," selected the Anglican Church's ministers, and resolved theological matters by statute. McConnell, 44 Wm. & Mary L. Rev. at 2118-19.

Thus in both Virginia and Massachusetts it was not disestablishment that ended the regimes of excluding and suppressing dissenters—it was the enactment of free exercise provisions. McConnell, 44 Wm. & Mary L. Rev. at 2119-20 (the free exercise provision of the Virginia Declaration of Rights "effectively ended the persecution of Baptist and other preachers and granted all Virginians the right to practice religion freely" "[b]ut it did not disestablish the Church"); *id.* at 2124-26 (provision of the Massachusetts Charter of 1691 guaranteeing "liberty of Conscience * * * to all Christians" "eased" attempts "to maintain religious homogeneity by banishing or punishing dissenters," although the Massachusetts establishment did not end until 1833).

This dynamic repeated itself in the context of "Blaine Amendments"—state constitutional provisions, enacted largely in the late 19th century, that restricted public funding for "religious" or "sectarian" institutions. See Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 493-95, 516-23 (2003). As many Justices of this Court have recognized, Blaine Amendments were "bigot[ed]" measures, *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas,

J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.), designed to prevent the funding of Catholic schools so as to "preserve the[] domination" of the public schools, which at the time were generically "Protestant in character." *Zelman*, 536 U.S. at 717-23 (2002) (Breyer, J., joined by Stevens and Souter, JJ., dissenting) (citing Philip Hamburger, *Separation of Church and State* 219, 287 (2002)). Thus, like the earlier efforts to suppress dissent in Virginia and Massachusetts, Blaine Amendments used discrimination against a religious minority as a means to *support* an otherwise existing state establishment—namely, the de facto "establishment of Protestantism" effected through the public school system. Hamburger at 219-21, 228-29; see also Philip Hamburger, *Prejudice and the Blaine Amendments*, First Things (June 20, 2017), https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments.

Nonetheless, because laws like Blaine Amendments did not themselves favor or control any particular church but instead "target[ed] the religious for special disabilities based on their religious status," the Court recently held that these laws are constitutionally "limited" not by the Establishment Clause, but "by the Free Exercise Clause." *Trinity Lutheran*, 137 S. Ct. at 2019, 2024 (internal quotation marks and citation omitted).

This history demonstrates that restrictions on religious minorities have consistently been addressed under free exercise provisions even when the restrictions were used to prop up an established church. But it is even clearer that when "restrictions on minority faiths are [*not*] part of any effort to establish some other religion, * * * such restrictions are * * * treated as a free

exercise issue." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1800 (2006). Put simply, government disfavor toward one religion does not—standing alone—establish another. But it does potentially violate free exercise.

Lukumi proves this point. In *Lukumi*, all nine Justices agreed that the City of Hialeah had singled out a particular religion for disfavored treatment: it passed an ordinance prohibiting the "central element of the * * * worship service" of the Santería religion, and did so in order to "target[]" Santería. 508 U.S. at 534, 541-42. But the Court declined to rely on the Establishment Clause. Surveying precedent under both Religion Clauses, the Court noted that Establishment Clause cases "for the most part have addressed governmental efforts to benefit religion or particular religions," rather than the sort of "attempt to disfavor [a] religion" at issue there. 508 U.S. at 532. The Court therefore held that "the Free Exercise Clause [would be] dispositive in [its] analysis." *Ibid.*; see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994) (plurality op. of Souter, J.) (applying Establishment Clause where religious group was vested with civic power but noting that if the group had instead been "*denied*" "the rights of citizens simply because of [its] religious affiliations," that would be a "free exercise" case (emphasis added)).

On the theory urged by Respondents and adopted by the courts below, *Lukumi* should have been an Establishment Clause case—the ordinance "established a disfavored religion," Santería. See, *e.g.*, *Hawai'i* v. *Trump*, No. 17-50, __ F. Supp. 3d ____, 2017 WL

1011673, at *4 (D. Haw. Mar. 15, 2017) (characterizing challengers' claim as being that "the Government has established a disfavored religion," Islam). The government's opening brief, too, is confused on this point, oddly citing *Lukumi* for the notion that if a law's operation is neutral, then *Lemon*'s purpose prong cannot be met. Gov't Br. 70-71.[3]

But *Lukumi* got the division of labor between the two Religion Clauses right. The historical establishments prohibited by the Establishment Clause were designed to establish—to bring within state protection or control—certain religions or religious ideas, not just to target one of many religions for disfavored treatment. Eliminating claimed religious targeting is the job of the Free Exercise Clause.

B. *Lukumi* provides the proper framework for using the Free Exercise Clause to combat claimed religious targeting.

Not only is the Free Exercise Clause the right Clause for this case historically and doctrinally—it is also the Clause best suited to combat the sort of religious targeting alleged here.

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[3] This approach gets *Lukumi* triply wrong: First, as we demonstrate in section I above, *Lemon* is the wrong place to start with Establishment Clause analysis; using the historically-rooted *Lukumi* to rehabilitate the utterly ahistorical *Lemon* test is perverse. Second, *Lukumi* expressly disclaims any relation to the Establishment Clause. 508 U.S. at 532. Third, *Lukumi* holds that a law's mere operation—with or without animus—is sufficient to *prove* a violation of the *Free Exercise Clause*; it does not create a method to *disprove* a violation of the *Establishment Clause*.

The key question in this case is whether a law that (according to the courts below) is facially neutral with respect to religion in fact embodies hostility toward one particular religion, targeting it for disfavored treatment. See Pet. App. 52a-53a; *Hawai'i*, 2017 WL 1011673, at *12. That is a question Free Exercise doctrine is well equipped to answer. Because the Free Exercise Clause prohibits, among other things, lawmakers from "devis[ing] mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices," the *Lukumi* Court identified "many ways" that a plaintiff can demonstrate that a facially neutral law in fact constitutes "covert suppression of particular religious beliefs" or a "subtle departure[] from" religious neutrality. 508 U.S. at 533-34, 547 (internal quotation marks and citation omitted); see also *id.* at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."); *Trinity Lutheran*, 137 S. Ct. at 2021 (in *Lukumi*, "despite [the laws'] facial neutrality, the[y] had a discriminatory purpose easy to ferret out"). These carefully calibrated techniques for uncovering "masked," "covert," or "disguised" hostility toward religion stand in stark contrast to the ineffective *Lemon* test, which focuses on inherently subjective perceptions of the lawmaker's intent. See *County of Allegheny*, 492 U.S. at 675-76 (Kennedy, J., concurring in judgment in part and dissenting in part) (*Lemon* test requires courts to

"[d]ecid[e] cases on the basis of * * * an unguided examination of marginalia" and using "little more than intuition and a tape measure.").[4]

In contrast, *Lukumi* illustrates at least seven ways a plaintiff can prove that a law is not "neutral and of general applicability" with respect to religion under the Free Exercise Clause. See *Lukumi*, 508 U.S. at 531-32 (citing *Emp't Div.* v. *Smith*, 494 U.S. 872 (1990)). This elaboration of neutrality and general applicability, not the *Lemon* test, should determine the constitutionality of the Executive Order here. The Court should therefore remand so that the parties can litigate under the Free Exercise Clause in the first instance, and the lower courts can consider whether any of the following paths to strict scrutiny is satisfied.

1. Does the law facially target religion?

First, a plaintiff can show that a law is not neutral and generally applicable by showing that the law facially targets religion. "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. Thus if a law's benefits or burdens are determined by "refer[ence] to a religious practice without a secular meaning discernable from the language or context," the law is not neutral and generally applicable under the Free Exercise Clause, and strict scrutiny applies. *Id.* at 533-34.

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[4] Of course, while the gravamen of Respondents' claim is that the Executive Order is the result of anti-Muslim animus, "the Free Exercise Clause is not confined to actions based on animus," *Shrum* v. *City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.); and *Lukumi* illustrates many ways that a plaintiff can get to strict scrutiny without showing animus.

2. Does the law, in its real operation, result in a religious gerrymander?

Facial neutrality is the "minimum," but strict scrutiny applies even to facially neutral laws if "the effect of [the] law in its real operation" is to accomplish "a religious gerrymander." *Lukumi*, 508 U.S. at 535 (citation omitted). A gerrymander exists when a law—evaluated in light of its stated, nondiscriminatory purpose—is so underinclusive with respect to secular conduct, and so overinclusive with respect to religious conduct, that its "burden * * *, in practical terms, falls on adherents [of a particular religion] but almost no others." *Id.* at 534-37.

3. Does the law fail to apply to analogous secular conduct?

Short of a gerrymander, another way a plaintiff can prove a Free Exercise violation is to show that the law's "prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). Thus, in *Lukumi*, the law at issue was not neutral and generally applicable because it exempted animal killing for certain secular reasons, but not religious reasons, even though secular killings would endanger the government's purported interests in protecting public health and preventing animal cruelty just as much as or more than religious sacrifices. 508 U.S. at 533-34. The categorical-exemption inquiry is designed to prevent the government from making "a value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order of Police*

Newark Lodge No. 12 v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

4. Does the law give the government open-ended discretion to make individualized exemptions?

Another way to show that a law is not neutral and generally applicable is to show that it gives the government open-ended discretion to make "individualized exemptions." *Lukumi*, 508 U.S. at 537. Individualized exemptions trigger strict scrutiny if they are capable of being "applied in practice in a way that discriminates against religiously motivated conduct," relative to secular conduct equally undermining the government's stated interests. See *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884).

5. Has the law been selectively enforced?

Even a law that is neutral and generally applicable on its face can violate the Free Exercise Clause if the plaintiff shows that it has "been enforced in a discriminatory manner." *Blackhawk*, 381 F.3d at 208. This is because "selective * * * application" of a facially neutral and generally applicable law "devalues" religious reasons for engaging in conduct just as much as a law that facially exempts analogous secular conduct. *Tenafly Eruv Ass'n, Inc.* v. *The Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002).

6. Does the law's historical background show that the lawmaker's purpose was to discriminate based on religion?

If a law by its terms is neutral and generally applicable and there is no evidence of selective enforcement, it could still trigger strict scrutiny if its "historical background"—including "statements made by members of the decisionmaking body"—indicates a purpose to discriminate based on religion. *Lukumi*, 508 U.S. at 540-42 (opinion of Kennedy, J., joined by Stevens, J.). The contours of this inquiry, however, are contested. Only two Justices agreed in *Lukumi* that this type of evidence could be significant, and two other Justices disagreed, arguing that the "evil motive[] of [a law's] authors" is irrelevant. Compare *ibid.* (plurality opinion) with *id.* at 558-59 (Scalia, J., joined by Rehnquist, C.J., concurring).

7. Does the law discriminate between religions?

Finally, laws that discriminate *between* religions, rather than just between religion and nonreligion, also violate the Free Exercise Clause. *Lukumi*, 508 U.S. at 536 (citing *Larson* v. *Valente*, 456 U.S. 228, 244-46 (1982)); *Smith*, 494 U.S. at 877 (same). Thus, in applying the other six categories of the *Lukumi* analysis, if a law's text, "object," exemptions, or (possibly) motive demonstrate a preference for conduct by members of some religions over others, rather than for secular conduct over religious conduct, the law nonetheless trig-

gers strict scrutiny. *Larson*, 456 U.S. at 245-47 (describing this as a rule against "denominational preferences").[5]

C. Because Free Exercise claims are usually subject to strict scrutiny and relief is plaintiff-specific, the choice of Clause is particularly important.

Relying on the Establishment Clause rather than the Free Exercise Clause creates important problems concerning the balancing of interests and the scope of relief. First, by relying solely on the Establishment Clause, the parties litigated, and courts below decided, an important issue with potentially serious implications for national security without ever balancing the government's claimed interests. Second, the scope of the remedy granted—invalidation of the entire Executive Order—was far broader than necessary to provide relief to the specific plaintiffs before the courts.

The first practical problem derives from another key difference between the Establishment and Free Exercise Clauses: the extent to which each Clause accounts for the strength of the government's interest in

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[5] Although *Larson* invokes both the Establishment Clause and the Free Exercise Clause, this Court's decisions in *Smith* and *Lukumi* treat *Larson* as essentially Free Exercise precedent. See *Lukumi*, 508 U.S. at 536; *Smith*, 494 U.S. at 877; accord *Larson*, 456 U.S. at 245 ("Th[e] prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); see also *id.* at 255 (characterizing the law at issue as "religious gerrymandering"). That treatment is consistent with *Larson*'s application of strict scrutiny, 456 U.S. at 246-51—an analysis that typically occurs under the Free Exercise Clause, not the Establishment Clause. See *infra* section II.C.

enacting the challenged law. The Establishment Clause is a structural limitation on government power, so "Establishment Clause violations * * * are usually flatly forbidden without reference to the strength of governmental purposes." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (McConnell, J.) (collecting cases). But Free Exercise claims generally *are* subject to an interest-balancing test—strict scrutiny. Under the Free Exercise Clause, once a law burdening religious exercise is determined not to be neutral or generally applicable, it still passes constitutional muster if it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (internal quotation marks and citations omitted).[6]

Strict scrutiny plays an important role in the Free Exercise analysis. To be sure, it is a demanding test; when applied correctly, it is the "rare" law that survives it. *Lukumi*, 508 U.S. at 546. But strict scrutiny at least leaves open the possibility for courts to strike "appropriate[] balance[s]" between free exercise and serious government needs—balances that can account for "context" and "sensitivity to security concerns"

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[6] The exception is for laws "targeting religious beliefs as such," which are "never permissible." *Trinity Lutheran*, 137 S. Ct. at 2024 n.4 (quoting *Lukumi*, 508 U.S. at 533). This distinction goes all the way back to *Cantwell* v. *Connecticut*: "the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." 310 U.S. 296, 303-04 (1940). The government cannot bring a strict scrutiny affirmative defense to the "absolute" claims. On remand, the parties should be given opportunity to explore under the Free Exercise Clause whether the Executive Order targets beliefs or status.

when necessary. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-23 (2005).

Because these cases, to date, have been litigated as Establishment Clause cases rather than Free Exercise cases, the courts below failed to analyze the Executive Order under strict (or any other level of) scrutiny. Instead, the courts held the Executive Order likely unconstitutional and enjoined it immediately upon concluding that it violated *Lemon*'s purpose prong. Pet. App. 64a-65a; *Hawai'i*, 2017 WL 1011673, at *15 (interest balancing not "necessary to the Court's Establishment Clause determination"); see also *Aziz* v. *Trump*, No. 1:17-cv-116, __ F. Supp. 3d ____, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) (Establishment Clause concerns "do not involve an assessment of the merits of the president's national security judgment."). That was error. As explained above, the Executive Order does not violate the Establishment Clause, and under the more appropriate Free Exercise Clause analysis, the parties and courts should address whether the order is neutral and generally applicable and then, if appropriate, whether the government can satisfy strict scrutiny.

The failure to apply strict scrutiny provides yet another illustration of how *Lemon* is problematic. With no interest balancing, *Lemon*'s purpose prong renders any law that targets religion unconstitutional. Pet. App. 47a-65a; *Hawai'i*, 2017 WL 1011673, at *12; see also *Aziz*, 2017 WL 580855, at *7. But that is flatly inconsistent with *Lukumi*, which holds that a showing of religious discrimination is not the end of the analysis, but just one way among many to trigger strict scrutiny. *Lukumi*, 508 U.S. at 533 (a non-neutral law

is "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest").

The second practical problem with following *Lemon* rather than *Lukumi* here is that the scope of the remedies granted—worldwide injunctions against carrying out the Executive Order—is far broader than necessary to provide relief to Respondents. As we noted above, the natural result of a successful Establishment Clause claim is invalidation of the challenged provision, because the Establishment Clause acts as a structural constraint on government power, like the doctrine of separation of powers.

But at issue here is something more like a typical civil rights claim, where individuals and institutions need relief from the application of a particular government policy to their specific circumstances. The Free Exercise Clause, which allows for remedies tailored to the specific plaintiffs before the Court, is far better suited to resolving this sort of dispute than the relatively inflexible Establishment Clause. That outcome would also reduce the scope of church-state conflict by restricting the footprint of the remedy to only what is necessary to provide relief to the specific plaintiffs before the courts.

D. A proper Free Exercise analysis would focus on the facts concerning specific plaintiffs.

Respondents did not invoke the Free Exercise Clause below, although the plaintiffs in several other challenges to the Executive Order have done so, including some in which counsel for Respondents have

appeared.[7] In order to approach this case correctly on remand, Respondents should be given an opportunity to make the argument that the Executive Order violates the Free Exercise Clause.

A proper Free Exercise analysis should focus on how the Executive Order applies to the specific circumstances of the specific plaintiffs before the courts. That is because religious liberty claims are best decided, and typically decided, on a retail rather than wholesale basis. The reason lies with the nature of Free Exercise claims, which must be rooted in religious conscience in order to be valid. In contrast to Free Speech claims, where the First Amendment protects the "marketplace of ideas," *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017), the Free Exercise Clause protects religious conscience as it manifests itself in public or in private. That is why a Free Exercise plaintiff must prove sincerity, while a Free Speech plaintiff need not. That is also why in making out her claim a Free Exercise plaintiff must explain the nature and religiosity of her beliefs. "[P]hilosophical and personal rather than religious" beliefs are not enough. *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972). The plaintiff's contested actions or omissions must be manifestations of a sincere religious belief. And because a Free Exercise plaintiff must prove up both sincerity and the specific nature of her religious beliefs and practices, it is

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[7] See Second Am. Class Action Compl. ¶¶ 271-276, *Doe* v. *Trump*, No. 2:17-cv-178 (W.D. Wash. filed May 8, 2017 (ACLU appearing as counsel for plaintiffs); First Am. Class Action Compl. ¶¶ 9, 110-16, *Al-Mowafak* v. *Trump*, No. 3:17-cv-557 (N.D. Cal. filed Mar. 13, 2017) (counsel of record for Respondents in No. 16-1436 appearing as counsel for plaintiffs).

difficult for courts to decide Free Exercise claims in gross.

This retail focus is true as well of the government's strict scrutiny affirmative defense. As the Court put it in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), strict scrutiny under the Free Exercise Clause is evaluated "through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." 546 U.S. at 430-31. "In [*Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Yoder*], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.*

Given this fact-specific, "to the person" approach, if Respondents wish to pursue a Free Exercise claim, on remand Respondents should establish, and the lower courts should determine, the factual circumstances of both the nature and sincerity of Respondents' claims, as well as the specific justifications the government has for applying the Executive Order to the "particular claimant[s]" who can make out a proper showing of burden on a sincere religious exercise. *O Centro*, 546 U.S. at 430-31.

For example, Respondents may make out a claim, based on their specific circumstances, that their religious exercise has been burdened by a regulatory system "in which individualized exemptions from a general requirement are available." *Lukumi*, 508 U.S. at 537. In such a situation, "the government 'may not re-

fuse to extend that system to cases of religious hardship without compelling reason.'" *Ibid.*, (quoting *Smith*, 494 U.S. at 884). If Respondents can identify a specific religious exercise that the government has burdened, and show that the Executive Order's "detailed provision permitting case-by-case waivers," Gov't Br. 10, constitutes a system of individualized exemptions that excludes waivers for religious hardship under *Lukumi*, they will have made out their *prima facie* case under the Free Exercise Clause.[8] Then the burden would shift to the government to demonstrate, with respect to the specific plaintiffs involved, that it has a compelling interest in imposing a burden on the religious exercise(s) identified by those plaintiffs.

Yet no one has had a chance to engage in this sensible fact-specific and plaintiff-specific approach because the parties in these particular cases did not press free exercise claims, and the lower courts have followed the failed *Lemon* test rather than the proven *Lukumi* analysis. "Like some ghoul in a late-night horror movie," *Lemon* continues to sow confusion in the lower courts, despite "being repeatedly killed and buried" by this Court. *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment). The Court should resolve the confusion, and make clear that *Lukumi*, rather than *Lemon*, controls religious-targeting claims like this one.

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[8] *Amicus* does not address any of the government's justiciability arguments.

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It is said that bad facts make bad law. But bad law can make bad law too. Taking the *Lemon* path rather than the *Lukumi* path in these cases guarantees the further proliferation of bad law. The Court can set this extremely important litigation on the right footing at the outset by reversing the decisions below, setting forth the appropriate Establishment Clause standard and clarifying the ways in which the Free Exercise Clause remains available if Respondents choose to press such a claim under the appropriate constitutional standard.

CONCLUSION

The decisions below should be vacated and remanded.

Respectfully submitted.

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